IN THE

Supreme Court of the United States

October Term, 1956

No. 35

CHARLES ROWOLDT,

Appellant,

vs.

J. D. PERFETTO, Acting Officer in Charge of Immigration and Naturalization Service,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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INDEX

Table of Cases Cited

Statutes Cited

Authorities Cited

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

The undersigned organization, by and through its counsel, respectfully ask leave to file the within Brief *Amicus Curiae* on behalf of appellant in the above entitled action.

Counsel for said applicant are familiar with the question involved in the case, and the scope of their presentation, and believe there is a necessity for additional argument on the points specified hereinafter and in its brief.

Applicant is a national association of attorneys devoted to the cause of civil liberties and civil rights for *all* persons. Its interest in this litigation arises from its belief that Section 241(a)(6)(C)(i) of the Walter-McCarran Act is an unconstitutional legislative attempt to substitute a law for a trial.

Counsel for applicant are aware of this Court's ruling in *Galvan* v. *Press*, 347 U. S. 522, upon the constitutionality

of a law similar to the one now before it. However, counsel are informed and believe that the arguments therein advanced did not embrace the points raised in applicant's brief, nor do they seem to be discussed in the opinion itself.

Because it is important to the protection of the civil liberties of all persons, irrespective of citizenship, that laws hear before they condemn, and because applicant is convinced that the instant legislation is such a law, applicant respectfully requests permission to file the within Brief *Amicus Curiae.*

Respectfully submitted,

ROYAL W. FRANCE,
Counsel for Applicant.

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BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT

In the case at bar, appellant has been ordered deported not because he has committed a crime, treason or espionage, or because he advocates—or ever advocated—the forceful overthrow of government, but solely because he was alleged to have been, twenty-one years ago, a member of the Communist Party of the United States.[1] The Board of Immigration Appeals, after sustaining a finding that the appellant was a member of that organization in 1935, declared:

> "His deportation from the United States is mandatory."[2]

If this is so, it is due to Section 241(a)(6)(C)(i) of the Immigration and Nationality Act,[3] which provides, in per-

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[1] See same case below: 228 F. (2d) 109.

[2] Ibid., p. 110.

[3] 8 U. S. C. A. Sec. 1251 (a) (6) (C) (i), enacted June 27, 1952. Originally enacted in substantially the same language in the Internal Security Act of 1950, 8 U. S. C. A. Sec. 137 (2) (C).

tinent part, that *any* alien shall be deported who—

> "(6) is or *at any time* has been, after entry, a member of any of the following classes of aliens:
>
> (c) Aliens who are members of or affiliated with
>
> (i) the Communist Party of the United States
> * * *."

Amicus contends that the statute at bar is a bill of attainder and an unconstitutional usurpation of the judicial function by virtue of which certain named or easily identified aliens are denied procedural due process of law.

ARGUMENT

I. The statute at bar is, on its face, a bill of attainder.

Article I, Section 9 of the United States Constitution provides that:

> "No bill of attainder * * * law shall be passed."

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial * * * These bills are generally directed against individuals by name; but they may be directed against a whole class * * *." *Cummings* v. *State of Missouri*, 4 Wall. 277, at 323.

> "It is very true that bills of attainder have been passed against persons by some description, when their names were unknown. But in such cases the law leaves nothing to be done to render its operation effectual, but to identify those persons. Their guilt, its nature, and its punishment are fixed by the statute, and only their personal identity remains to be made out." *Ex parte Garland*, 4 Wall. 333, Miller, J., (dissenting, on other grounds) at 389.

A. The statute under consideration here falls clearly within the definition of a bill of attainder. It is similar to other statutes which have, in the past, been declared void as bills of attainder because they described an attainted group:

U. S. v. *Lovett*, 328 U. S. 303 (1946);
Davis v. *Berry*, 216 F. 413 (1914);
Opinion to Rhode Island House of Representatives, 96 A. 2d 623 (1953).

Bills of attainder have been directed against:

a. Tories in the American Revolutionary War:

Cooper v. *Telfair*, 4 Dal. 14 (1800);
Sewall v. *Lee*, 9 Mass. 363 (1812).

b. Persons participating in duelling:

Matter of Dorsey, 7 Porter (Ala.) 294 (1830).

c. Secessionists and persons who avoided serving in Union forces in the Civil War:

Cummings v. *Missouri, supra;*
Ex parte Garland, supra;
Pierce v. *Carskadon*, 83 U. S. 234 (1872);
Green v. *Shumway*, 36 N. Y. Prac. 5 (1868).

d. Criminals twice convicted of a felony:

Davis v. *Berry*, 216 F. 413 (1914).

e. "Subversives" employed by the United States government in certain posts:

U. S. v. *Lovett, supra.*

f. Relatives and spouses of elective officials and heads of City departments:

Opinion to Rhode Island House of Representatives, supra.

The group attainted by the Walter-McCarran Act can be identified as easily as several of these groups could be, and more easily than some of them.

B. The statute inflicts punishment without a judicial trial.

1. The *purpose* of many of the deportation arrests based on charges of political activity is punishment, not deportation.

Both the Attorney General of the United States and the Immigration and Naturalization Service have repeatedly stated that they could not effectuate deportation to "Iron Curtain" countries because of their policy of refusing to admit American political deportees for permanent residence. (See, *e. g.*, 1955 Annual Report of the Attorney General, p. 408.) In the face of this fact, the Attorney General has ordered the arrest of large numbers of persons whom he knew in advance he could not deport.

In 1954, the Committee on Immigration and Naturalization of the National Lawyers Guild prepared a statistical study based on 219 typical political deportation cases which arose between 1944 and 1952. ("Political Deportations in the United States: A Study in the Enforcement Procedures: 1919-1952", XIV Lawyers Guild Review 93-128, Fall, 1954, attached hereto and made a part hereof.) This study showed that, out of 204 cases in which the country of origin of the deportee was known, 47% were born in countries to which they could not be deported because the countries would not accept them for permanent residence.

2. The deportation *procedure* involves punishment and the threat of punishment.

The distinction between the procedures in deportation cases and criminal cases has been exaggerated in the past, but some courts have recently followed the facts and not the formula. The "principle inherent in [the eighth] Amendment"—forbidding excessive bail—has been held

applicable to deportation proceedings, "whether or not such proceedings technically fall within its scope." (*U. S. ex rel. Klig* v. *Shaughnessy*, 94 F. Supp. 157, 160 (S. D. N. Y. 1950), cited with approval by this Court in *Carlson* v. *Landon*, 342 U. S. 524, n. 41.) So, too, the Federal Rules of Criminal Procedure as to the manner of executing a warrant and making return thereon have been applied to deportation warrants. (*Ex parte Sentner*, 94 F. Supp. 77, 79 (E. D Mo., E. D. 1950.)

In terms of denial of bail to deportees arrested on political charges and the setting of excessive bail, the distinction between these cases and criminal cases is negligible. (See, *e.g.*, comments by Chief Judge Clark of the Second Circuit in *U. S. ex rel. Potash* v. *Dist. Dir.*, 169 F. 2d 747, 753 (1948), on the setting of higher bail for a deportee than had been set against the same person in a case on criminal charges.) In its study, the Guild's Committee found that, at the time of arrest, bail had been refused in 7% of the cases studied, and in 20% of the cases, bail of $4,000 to $5,000 had been set. ("Political Deportations", *op. cit.*, Table 14, p. 118.) In 71 cases, the deportees had been re-arrested once following their original release on bail. 15 deportees had been re-arrested twice, and 4 had been re-arrested 3 times. The average length of detention was 55 days, and 14 had been held for over 2 months. (Table 15, p. 121.)

Under the statute, a non-citizen can be detained for six months following a final order of deportation, pending efforts to effectuate his deportation. (Sec. 242(c).) And, after the six months have elapsed, the deportee is subject to stringent supervisory parole conditions as long as he continues to live in this country. (Sec. 242(d).)

This control over the freedom of movement of a deportee bears little resemblance to the treatment of a defendant in a civil action.

3. *Deportation* is punishment.

In the typical bill of attainder, the "punishment" is "fixed by statute". (*Ex parte Garland*, quoted *supra*.) "Deportation is not punishment", as the maxim would have it, but, ironically, the humane considerations that can be decisive in the sentencing of a defendant in a criminal case are, of necessity, inapplicable. An alien is deported or he is not; his sentence cannot be judicially suspended because of his good character, the fact that he has no previous criminal record, or that he has a dependent wife and children.

When the maxim was first written, there was some truth in it. In the 1892 Act, for instance, it was apparent that Congress was attempting to do no more than to expel those whom it had forbidden to enter, by requiring all resident Chinese laborers to secure certificates of residence showing them to be legally in the country by virtue of entrance before the first exclusion act.* (See, *e.g.*, *U. S.* v. *Jim*, 47 Fed. 433 (1891), in which a Chinese national, slated for expulsion, was able to prove to the Court that he had been in the United States over 10 years, and was therefore released, along with nine others similarly situated.) And in the earlier Act of 1888, Congress had provided an exception to allow re-entry of Chinese laborers otherwise excludable who could show, before leaving the United States, that they had a wife, child or parents in this country, or property valued at $1,000.**

Compare these provisions with those in the 1952 Act, which require deportation regardless of the length of residence in the United States or the close relatives who would be left behind at the time of deportation. In its study, the Guild's Committee found that 63% of the deportees had resided in this country for more than 31 years. 96% had

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* 27 Stat. 25.

** 25 Stat. 504 (Oct. 1, 1888) and 25 Stat. 476-7 Sept. 13, 1888).

resided here more than 21 years, and 98% more than 10 years. (See Table 2, p. 101.)

Half of the deportees studied were married, and 69 were married to United States citizens. 101 were parents of citizen-children and 24 had sons who fought in World War II or served in the American Armed Forces. At least 21 of the group were grandparents and two or more were great-grandparents of American citizens.

To deny that the "banishment" of such persons constitutes punishment is to be become so involved in semantics as to completely lose sight of human realities.

C. The statute provides for penalty within the meaning of the Constitutional prohibition against bills of attainder.

Whether or not deportation is punishment within the definition applicable to criminal law, it is similar to penalties inflicted by statutes held void as bills of attainder.

Bills of attainder have:

a. Prohibited individuals from voting, holding public office or private position of trust and profit, or practicing law or other professions:

Matter of Dorsey, supra;
Cummings v. *Missouri, supra;*
Ex parte Garland, supra;
Green v. *Shumway, supra;*
Opinion to Rhode Island House of Representatives, supra.

b. Prohibited the appropriation of money to pay salaries to individuals in U. S. government service:

United States v. *Lovett, supra.*

c. Confiscated all real and personal property and declared individuals to be "aliens":

Cooper v. *Telfair, supra;*
Sewall v. *Lee, supra.*

d. Prohibited persons from taking advantage of certain equitable forms of action:

Pierce v. *Carskadon, supra.*

e. Subjected persons to the surgical operation called vasectomy:

Davis v. *Berry, supra.*

For all the foregoing reasons, we submit that the statute must be condemned as contrary to the bill of attainder provision of the Constitution. We submit that this point has not heretofore been adjudicated by this Court, so that the "slate" is clean.

II. The statute at bar is, on its face, special legislation which deprives aliens situated like appellant of their rights, privileges and immunities without due process of law.

The cornerstone of a democracy is that individual rights and privileges are secured by a judicial process of general application; acting equally upon all; serving as the law of the land. Webster, while arguing that a state statute was an act of attainder, gave meaningful content to due process of law:

> "By the law of the land, is most clearly intended, the general law; *a law which hears before it condemns;* which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen

> shall hold his life, liberty, property and immunities under the protection of the general rules that govern society." (Emphasis supplied.)[4]

If a legislative act, such as the one at bar, singles out an individual or group of individuals for special favor or condemnation it becomes the servant of tyranny, for it hastens to judgment before the cause may be fairly heard. In brief, rule by legislative fiat dispenses with all those safeguards so carefully established to protect the individual from impasioned mobs and political expediency. It invokes those ugly chapters of not so ancient English history which found a parliament vested with infinite powers, judicial as well as legislative, and a like disposition to exercise them.[5] This legislative assumption of judicial magistracy, of course, provided the crown with distinct advantages in its continuing quest for additional revenues, one of which appears in the infamous Grand Remonstrance:

> "[T]hat it may often fall out that the Commons may have just cause to take exception at some men for being counsellors and yet not charge the men with crimes for *these be grounds of diffidence which lie not in proof.*" (Emphasis supplied.)[6]

The consequence of commingling the two functions surprises no one:

> "[A]n act of Parliament was made, that all the Irish people should depart the realm, and go into Ireland before the Feast of the Nativity of the Blessed Lady,

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[4] *Dartmouth College* v. *Woodward* (1819), 4 Wheat. 517, 581.

[5] Holsworth, *History of English Law*, Vol. 1, p. 180 et seq. "[T]he judges were obliged to admit that these acts, however morally unjust, must be obeyed." (Ibid., p. 185.) See also: Wooddeson, *Lectures on the Laws of England* (1842), Vol. 2, pp. 499-508.

[6] Holsworth, *op. cit.*, p. 384.

upon pain of death, which was absolutely *in terrorem*, and was utterly against the law."[7]

Judicial enactment also made unnecessary the presence of the accused during the proceedings—a custom which enabled the Parliament of James II to attaint two to three thousand persons, confiscate their property, and sentence them to death unless they presented themselves at a time designated. The contingency was impossible of fulfillment, of course, because the list of those attainted was carefully concealed until after the passage of the appointed time.[8]

And even in America, significantly enough, many of those who helped draft our Constitution were themselves either the victims of or witnesses to the evils flowing from a legislature equipped with judicial power. Two notable examples are the attaint of Jefferson,[9] and the Massachusetts Act of Banishment of September, 1778, which forbade the return to that State of 308 named persons, 65 of whom were Harvard graduates.[10] These, and numerous similar abuses,[11] occurred during and immediately following a war (the Revolution), a favorite spawning ground for legislative enactments against unpopular persons and causes (*Cummings* v. *Missouri* (1866), 4 Wall. 277; *Ex Parte Gar-*

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[7] Proclamations, 12 Co. Rep. 74, 75; 77 Eng. Rep. 1352 (KB. 1610); see: Wormuth, *Legislative Disqualifications as Bills of Attainder*, 4 Vanderbilt Law Review 603, 607, 608.

[8] Cooley, *Constitutional Limitations* (8th Ed., 1927), pp. 536, 537.

[9] Clements, *Comments, Cases and Text on Criminal Law and Procedure* (1952), p. 3.

[10] 5 *Acts & Resolves of Massachusetts Bay* 912 (1778); see: Davis, *U. S.* v. *Lovett* and the Attainder Bogey in Modern Legislation, 30 Washington U. Law Quarterly, pp. 13, 16.

[11] Norville, *Bills of Attainder*: a rediscovered weapon against discriminatory legislation, 26 Oregon Law Review 78, 87; Davis, *op. cit.*; Thompson, *Anti-Royalist Legislation During the American Revolution*, 3 Ill. Law Review 81, 147.

land (1866), 4 Wall. 333; *United States* v. *Lovett* (1950), 328 U. S. 303).

It is scarcely accidental, then, that Congress is without authority to legislate by fiat. In fact,

> "'A government of laws, and not of men' was the rejection in positive terms of rule by fiat." (Mr. Justice Frankfurter, concurring, *U. S.* v. *United Mine Workers of America* (1946), 330 U. S. 258, 307, at p. 308.)

History had provided the authors of our Constitution with cogent reasons for withholding such authority from the Legislature; and they wisely created a third and separate branch of government, the Judiciary, whose independence and impartiality would impart to judgment that objectivity so vital to ordered liberty. Under our constitutional system, therefore,

> "No judicial power is vested in the Congress or either branch of it save in the cases [of impeachment and punishment of its own members]." (*Kilbourn* v. *Thompson* (1880), 103 U. S. 168, 198.)

Such an arrangement is the safest and the surest safeguard against legislative encroachment upon civil liberties.

> "[W]hat could be more obnoxious in a free government than the exercise of [judicial] power by a popular body, controlled by mere majority, fresh from the contests of exciting elections, and quite too apt, under the most favorable circumstances, to suspect the motives of their adversaries, and to resort to measures of doubtful propriety to secure party ends?"[12]

Realistically, special legislation is like "frontier law." Both are born of fear, bigotry and panic; both follow the

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[12] Cooley, *op. cit.* pp. 537-538.

assumption that guilt is so obvious that trial would only impede justice. However, due process of law means that neither a mob nor Congress can lynch the guilty. It means that Jews may not be deported qua Jews; nor Republicans qua Republicans.

The constitutional (and imperatively rational) proscription against special legislation is, therefore, to secure to *all* persons a fair and full hearing. *All* persons certainly includes *all* aliens since the latter are entitled to procedural due process of law as a matter of right (*Kwong Hai Chew* v. *Colding* (1952), 344 U. S. 590, 601; *Galvan* v. *Press* (1954), 347 U. S. 522, 531). If the procedural safeguards of the Constitution cover all aliens, it reasonably follows that such protection extends even to aliens who were or are members of the Communist Party. Hence, the inexorable conclusion that Congress simply does not possess the power to deport members of the Communist Party, *eo nomine*.

In enacting the statute at bar, Congress has held a legislative trial in which the alien's right to procedural due process of law has been put to a vote. What emerges is a political judgment, posited upon improper evidence, and ordained with no opportunity afforded the alien to be heard. The dreadful possibilities which lay within the grasp of a political body gifted with such powers as Congress has here sought to exercise has too frequently blotted the pages of history. The answer is always the same.

> "The legislature cannot be permitted to decide who is guilty of what in the guise of protecting the public. Otherwise, the fate of every citizen will rest not on the rock of constitutional justice but on the shifting sands of legislative pleasure." [14]

In the context of the foregoing, we believe that a reconsideration of *Galvan* v. *Press* is as called for, as reconsidera-

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[14] Comment, 53 Yale Law Journal 844, 861 (1954).

tion was given by this Court of the issue of flag salutes by school children. There, after first having upheld the practice in *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940), further reflection induced this Court within a few years to reach the opposite conclusion. *W. Virginia State Board* v. *Barnette*, 319 U. S. 624 (1943).

CONCLUSION

We respectfully submit, therefore, that this judgment should be reversed and deportation of the character here required by the statute declared to be what in fact it is, punishment by legislative fiat which offends both the prohibition against bills of attainder and the requirements of due process. *Galvan* v. *Press*, should be overruled.

Respectfully submitted,

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